

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE A.K.BASHEER

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

WA.No. 1181 of 2004

AGAINST THE JUDGEMENT IN OP.4366/1994 Dated 23/02/2004
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APPELLANT: RESPONDENTS IN THE OP.

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1. STATE OF KERALA REP. BY SECRETARY
TO GOVERNMENT, PUBLIC WORKS DEPARTMENT.
 2. THE CHIEF ENGINEER, IRRIGATION AND
ADMINISTRATION, THIRUVANANTHAPURAM.

BY GOVT PLEADER SRI BENNY GERVAZIZ

RESPONDENTS: PETITIONER IN THE O.P. AND I.A.

M.P.GOPALAN, IIND GRADE OVERSEER,
K.P.LP SUB DIVISION, VALLAPUZHA,
PALAKKAD DIST.

BY ADV. SRI.K.A.ABRAHAM

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 19/09/2007, THE COURT ON 04/10/2007
DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & A.K. BASHEER, JJ.

Writ Appeal No 1181 of 2004

Dated: 4th October 2007

JUDGMENT

Radhakrishnan, J.

This appeal has been preferred by the State of Kerala and Chief Engineer, Irrigation and Administration aggrieved by the order passed by the learned single judge in C.M.P. No 15514 of 2003 in O.P. No 4366 of 1994 clarifying that the leave without allowance granted to the petitioner from 1.5.1986 to 21.2.1991 would be treated as service for the purpose of pension.

2. Original Petition was preferred by the respondent herein seeking a writ of certiorari to quash Ext. P12 order passed by the Government dated 3.11.1993 rejecting the request of the petitioner for treating the period from 1.11.1983 to 21.2.1991 as duty and also for a writ of mandamus directing the respondents to treat the above mentioned period as duty. Learned single judge disposed of the original petition on 20.12.2002 directing the respondents to treat the period from 31.8.1986 to 21.2.1991 as period of leave without allowance and ordered that pensionary benefits would be

settled accordingly. Petitioner then filed C.C.C. No 1026 of 2003 since there was delay in implementing the judgment. Later Government passed an order G.O. (Rt) No 1197/03/WRD dated 23.9.1993 regularising the period of unauthorised absence of the petitioner from 1.9.1986 to 21.2.1991 as period of leave without allowance on condition that the said period would not be reckoned for pension. When the contempt case came up for hearing, counsel for the petitioner submitted before the learned single judge that in view of the stand taken by the Government in the above mentioned order dated 23.9.1993 that the petitioner would be making a petition for clarification of the judgment. Contempt case was closed, but liberty was given to move for a clarification as to whether the above mentioned period would be reckoned as qualifying service for the purpose of pension. Learned single judge allowed the petition for clarification and ordered accordingly. Aggrieved by the same State has preferred this appeal.

3. Shri Benny Gervasiz, learned Government Pleader submitted that the petition for clarification would not lie after the judgment has been complied with and the Contempt Case has been closed. Learned Government Pleader further submitted that the learned judge was not justified in granting liberty to file a petition for clarification while disposing of the contempt case. Learned judge in the contempt case is expected only

to examine whether the direction in the judgment has been complied with or not. Further it was pointed out that there was no arithmetical or clerical error crept in the order to be clarified. Sri K.A. Abraham, learned counsel for the appellant on the other hand contended that liberty was given by the learned judge while disposing of the contempt case to file a petition for clarification and hence the petition is perfectly maintainable.

4. Petitioner while working as 2nd grade Draftsman had applied for leave without allowance for the period from 1.9.1976 to 29.12.1976 for taking up employment abroad and the leave was sanctioned. After the expiry of the leave he did not join duty. Charges were levelled against him for unauthorised absence from duty and the same was sent by registered post in his last known address. Registered cover was received back with the endorsement of the postal authorities “addressee left India - hence returned”. Consequently show cause notice was issued on 5.7.1981 stating that it had been provisionally decided to remove him from service with effect from 30.12.1976. He was directed to show cause within 15 days of receipt of the memo and the notice was sent both on his address in India and abroad. Cover sent to his address in India was returned undelivered while the other was not returned. Later enquiry officer was appointed. Enquiry Officer after complying with the formalities and conducting

enquiry, submitted his report on 27.7.1982. Petitioner had however made a fervent request to condone his omissions and to drop the proceedings. Consequently Ext. P1 order was passed by the Chief Engineer on 27.7.1983 dropping all disciplinary proceedings against the petitioner with a warning. However it was ordered that action to get his leave sanctioned had to be taken up separately. In spite of Ext. P1 order petitioner did not report for duty and still continued to be on unauthorised leave from duty. Later Government issued Ext.P7 government order dated 4.9.1984 stating that the period spent on leave without allowances for employment elsewhere should be treated as “dies non” for all kinds of service benefits and that the petitioner would lose all service benefits including seniority in the grade with reference to those who might get promoted before he rejoined duty. It was noticed that the maximum period of leave without allowance that could be sanctioned for the purpose during the entire service of the applicant would be limited to ten years and the same was ordered to be recorded in the service book of the petitioner.

5. Petitioner did not report for duty even after the expiry of ten years leave. Hence disciplinary proceeding was initiated against the petitioner for unauthorised absence from 1.9.1986. Memo of charges was issued to him on 30.5.1990. Disciplinary proceeding was completed as per order dated

15.1.1991. Ultimately order was issued by the Chief Engineer on 15.1.1991 taking a lenient view that the period of absence of the petitioner from 1.9.1986 till the date of joining duty be treated as leave without allowance. Later petitioner joined duty on 22.2.1991. Petitioner thereafter moved the Government for treating the period from 1.9.1986 to 21.2.1991 as qualifying service for the purpose of pension. Request was rejected by the Government. Admittedly period of leave availed of by the petitioner from 1.9.1976 to 31.8.1986 is governed by Appendix XII A of Part I Kerala Service Rules. Appendix XII A (4) reads as follows:

4. Permanent officers and non-permanent officers who have completed probation in their entry cadre in the regular service of Government may be granted leave without allowances under these rules. In such cases, for, and during the currency of the period of leave, the officers shall lose all service benefits such as the earning of leave including half pay leave, pension, gratuity, increment etc. and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades before they rejoin duty.

Counsel appearing for the petitioner conceded that the period from 1.9.1976 to 31.8.1986 cannot be treated as qualifying service for the purpose of pension and other service benefits. After 31.8.1986 according to the petitioner, he had submitted various representations seeking permission to

join duty, but the Department did not respond and therefore the period from 1.9.1986 to 22.2.1991 be treated as leave without allowance under Rule 88 of Part I K.S.R. In support of this contention, counsel placed reliance on the decision of a Division Bench of this court in State of Kerala v. Dr V.M. Kurshid (I.L.R 2000 (1) Kerala 535). Learned Government Pleader on the other hand contended that there is nothing to show that Annexure R (a) order dated 15.1.1991 issued by the Chief Engineer or Ext P12 order dated 3.11.1993 were under Rule 88 of Part I K.S.R. Government Pleader submitted that the absence of the petitioner from duty unauthorisedly is the continuation of leave which was granted to him as per Appendix XII A of Part I K.S.R.

6. Admittedly leave without allowance from 1.9.1976 to 31.8.1986 was granted as per Appendix XII A of Part I K.S.R and therefore the period from 1.9.1976 to 31.8.1986 would be governed by clause (4) of Appendix XII A and therefore the said period cannot be treated for any service benefits including pension, gratuity etc. A person who had taken leave with permission cannot be in a worst position than a person who had taken leave unauthorisedly. Petitioner who had taken leave from 1.9.1986 to 22.2.1991 unauthorisedly would also be on the same disadvantage of a person who is governed by Appendix XII A Part I K.S.R and Rule 88 Part I

K.S.R would not come to his rescue. Petitioner also falls under the same category of persons who had taken leave without allowance for taking up employment abroad or within India. Therefore, our considered view is that the period from 1.9.1986 to 22.2.1991 cannot be counted as qualifying service for the purpose of half pay leave, pension, gratuity etc. Impact of Appendix XII A was not pointedly raised before the Division Bench in Dr V.M. Murshid's case. In such circumstances, the court has taken the view that the provisions of Appendix XII A have no application to the facts of that case. But so far as this case is concerned, Appendix XII A squarely applies and consequently we find no infirmity in the government order dated 23.09.2003 treating the period from 1.9.1986 to 21.2.1991 as leave without allowance on condition that the said period would not be reckoned for the purpose of pension.

7. The closure of contempt case indicates that the judgment has been complied with and it is not legal to issue further directions in a contempt case. A judge sitting in the contempt jurisdiction is only expected to examine whether judgment, order or direction has been complied with or not and if not proceedings be initiated. Judge is not expected to give further direction. This legal position is well settled by the decision of the apex court in Prithawi Nath Ram v. State of Jharkhand (2004) 7 S.C.C 261) and

Director of Education, Uttaranchal v. Ved Prakash Joshi (2005) 3 K.L.T Sh. Notes page 74 (SC). A Bench of this court, of which one of us, K.S.Radhakrishnan,J was a party, in Rajappan Nair v. Stephen Joseph (2005) 2 K.L.T 345 held that a judge dealing with a contempt case cannot give further direction. Judge who dealt with the contempt case was therefore not justified in granting liberty to the petitioner to file a clarification petition. Clarification should stand or lose, depending upon the maintainability of that petition and not on the liberty given by the judge while disposing of the contempt case. We are therefore of the view that the learned judge was not justified in entertaining the petition for clarification.

8. Appeal is allowed and the order passed by the learned single judge would stand set aside.

Sd/-
K.S. RADHAKRISHNAN
Judge

Sd/-
A.K.BASHEER
Judge

04/10/2007
en/

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